

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 9, 2003

Docket No. 2002-122

MAINE PUBLIC UTILITIES COMMISSION,
Investigation Into Potential Violations of
State Laws and Commission Rules by
WebNet Communications, Inc.

ORDER DETERMINING
JURISDICTION AND
CLARIFYING PROCEDURE

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we address the Motion to Determine Jurisdiction filed by WebNet Communications, Inc. (WebNet). We decide that we have jurisdiction to conduct this proceeding, which involves allegations of “slamming” (the changing of a customer’s telephone service provider without authorization) and other unlawful actions by WebNet. Specifically, we find that WebNet is a “telephone utility” as defined by 35-A M.R.S.A. § 102(19), and that we therefore we have jurisdiction over all of the alleged unlawful actions by WebNet. We also decide that we have jurisdiction over the alleged slamming violations by WebNet directly under 35-A M.R.S.A. § 7106, regardless of WebNet’s status as a telephone utility.

This Order clarifies the statutory bases and the procedure for our consideration of all the allegations contained in the Prosecutorial Staff Report. We will consider all of the substantive allegations (including the slamming allegations) under 35-A M.R.S.A. §§ 1303 and 1306 to determine whether they are “practices” or “acts” by a public utility that are “unjust” or “unreasonable” or “otherwise in violation this Title.” (Title 35-A). We will also consider the alleged slamming violations under 35-A M.R.S.A. § 7106. We clarify that the procedure for the proceedings under both Sections 1303 and 7106 is essentially the same. The procedure is governed by procedural provisions in 35-A M.R.S.A. § 1301-1323, Chapter 110 of the Commission’s Rules (Practice and Procedure), §§ 710-1004 (Adjudicatory Proceedings), and 5 M.R.S.A. §§ 9051-9064 (Maine Administrative Procedure Act (APA), Chapter 375, subchapter IV, Adjudicatory Proceedings).

II. BACKGROUND

We initiated this proceeding on March 12, 2002 with a Notice of Investigation (NOI). The NOI stated that 125 “Maine consumers have complained that either WebNet changed their long distance telephone service without their authorization, or that they agreed to change their service but were not charged the rates promised and did not

receive the incentives promised when they agreed to sign up with WebNet for long distance telephone service.” The NOI stated that the Commission was opening an investigation pursuant to 35-A M.R.S.A. § 1303(2).

The NOI was followed by an Order Regarding Procedures, Discovery and Intervention, issued on April 26, 2002. This order established a “Prosecutorial Staff” and ordered the Prosecutorial Staff to file a report “containing its findings, conclusions and recommendations for Commission action.”

In its response to the Prosecutorial Staff Report, WebNet made several arguments concerning why the proceeding should not continue. In an Order Continuing Proceeding (September 4, 2002), we rejected those arguments.

On November 8, 2002, WebNet filed the Motion to Determine Jurisdiction, and a supporting memorandum, that we consider in this Order.

III. SUMMARY OF ARGUMENTS

In its Motion, WebNet claimed that the Commission lacked jurisdiction over WebNet because WebNet was not a “telephone utility” as defined in Maine law and therefore is also not a “public utility.” A “public utility” is defined in 35-A M.R.S.A. § 102(13) as “every...telephone utility [and several other listed types of utilities], as those terms are defined in this section...” WebNet argues that the Commission cannot assert jurisdiction over WebNet because WebNet is not a public utility, and because the Commission initiated this investigation under 35-A M.R.S.A. § 1303, which only allows the Commission to investigate activities of public utilities.

35-A M.R.S.A. § 102(19) defines a “telephone utility” as an entity “owning, controlling, operating or managing any telephone line for compensation within this State.” A “telephone line” is defined in 35-A M.R.S.A. § 102(20) as:

all conduits, ducts, poles, wires, cables, instruments and appliances, specifically including telecommunications equipment for customers with special needs subject to the provision of section 7504, and all other real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone, whether that communication is accomplished with or without use of transmission wires.

WebNet argued that, as a “switchless reseller,” it does not “own, control, operate or manage” a “telephone line” and therefore is not a “telephone utility” or a public utility. WebNet stated that it:

employs no facilities, lines, switches or other property in its operations or in providing its services. Its mode of operation is to buy services at wholesale or discounted rates from an underlying carrier. It is the underlying carrier that

furnishes all physical network plant and facilities (switches, lines and equipment) used to transmit the telecommunications of end users between and among points identified by standard telephone dialing protocols. Respondent is not engaged in any way with the physical transmission of its customers' telecommunications traffic.

The Prosecutorial Staff argued that WebNet, as a switchless reseller, does manage a telephone line and is therefore a telephone utility under the statutory definition:

Provision of service by a switchless reseller involves the management of a telephone line for purposes of providing interexchange service and, therefore, any carrier providing service via switchless resale meets the statutory definition of a telephone utility.

... a switchless reseller reaches an agreement with an underlying facilities based carrier, such as AT&T, to use the carrier's network to provide service. It is the reseller, not the underlying carrier, that maintains the direct relationship with the customer. The underlying carrier provides the reseller with customer-specific usage information and the reseller charges the customer, answers customer questions, and markets new products or calling plans. The reseller, not the underlying carrier, determines when and if a customer should be disconnected from the service and makes the necessary arrangements with the underlying carrier and the appropriate local exchange carrier.

In the alternative, the Prosecutorial Staff argued that, even if WebNet is not a telephone utility, the slamming statute, 35-A M.R.S.A. § 7106, applies to WebNet because it applies to "local or intrastate interexchange carriers," a category that the Staff claims is broader than "telephone utilities." The Staff provided numerous instances in which the Legislature had given the Commission jurisdiction over non-utilities, including several statutes that use terminology (for example, "telecommunications service provider"¹ and "providers of intrastate telecommunications services"²) similar to that used in the slamming statute. It argued that it is clear that the Legislature intended the words "local or intrastate interexchange carriers" to be applied according to their "plain meaning," as demonstrated by the fact that in other recently enacted statutes, the Legislature used the term "telephone utility" when it intended that the statutes in question apply only to that narrower class.³

¹ 35-A M.R.S.A. § 7101-B (the "access parity" statute).

² 35-A M.R.S.A. § 7104 (requiring contributions to support universal service).

³ See 35-A M.R.S.A. §§ 7105 and 7306.

The Public Advocate argued that the Commission does not need to decide whether WebNet is a telephone utility because, based on arguments similar to those of the Prosecutorial Staff, the slamming statute applies to WebNet whether it is a public utility or not. The Public Advocate also provided legislative history of 35-A M.R.S.A. § 7106 (discussed in greater detail below) that it claims establishes that the Legislature clearly intended that the slamming statute would apply to all entities that sell telephone service even if they are not public utilities.

In reply, WebNet continued to argue that it was not a telephone utility. It agreed, however, that it is an intrastate interexchange carrier and agreed with the arguments of the Prosecutorial Staff and Public Advocate that the slamming statute applies to carriers, including WebNet, even if they are not public utilities. Nevertheless, it argued that the Commission lacks “jurisdiction” because it brought the proceeding under the wrong statute, 35-A M.R.S.A. § 1303, which expressly applies to public utilities. WebNet stated that “although the Commission’s general jurisdiction under Section 7106 is no longer questioned, the Commission nevertheless lacks jurisdiction to conduct this proceeding because Section 7106 does not authorize this proceeding as *it has been initiated...*” (emphasis added). WebNet claims that the Commission cannot “cure” the defect by bringing a proceeding under Section 7106 because that statute lacks “published procedures.” We discuss WebNet’s argument in detail below.

III. DISCUSSION

A. Whether WebNet is a Public Utility.

For the reasons stated below, we find that WebNet is a telephone utility and is therefore subject to the jurisdiction of this Commission. It follows that the Commission may properly investigate the activities of WebNet in a proceeding brought pursuant to 35-A M.R.S.A. § 1303.

Initially, we note that we disagree with the Public Advocate that we should not decide this question. While many of the allegations contained in the Prosecutorial Staff Report involve slamming, many do not, and some of the latter apply only to public utilities.⁴ If we did not address the issue of whether WebNet is a telephone utility, we could not consider these claims. The Prosecutorial Staff Report also asks the Commission to revoke WebNet’s authority to provide service. If we avoided deciding

⁴ These include claims that WebNet charged rates in excess of the rates contained in its rate schedules in violation of 35-A M.R.S.A. § 309(1), and that it increased rates without providing notice in violation of 35-A M.R.S.A. § 7307. Staff has also alleged various deceptive and fraudulent practices, which could serve as bases for findings of “unreasonable acts or practices” by a public utility under 35-A M.R.S.A. § 1306. See ordering paragraphs below.

WebNet's public utility status, we could not consider that requested action because it would not be clear whether WebNet even needed such authority.⁵

Based on responses filed by WebNet on December 12, 2002 to a data request issued by the hearing examiner, we find that WebNet is telephone utility under Maine law. As noted above, 35-A M.R.S.A. § 102(19) states that a "telephone utility" includes a person "owning, controlling, operating or managing any telephone line for compensation within this State." 35-A M.R.S.A. § 102(20) states that a "'telephone line' includes all conduits, ducts, poles, wires, cables, instruments and appliances ... and all other real estate, fixtures and *personal property* owned, controlled, operated or managed *in connection with or to facilitate* communication by telephone, whether that communication is accomplished with or without use of transmission wires." (emphases added). The responses to Items 1-7 of the Examiner's data request reaffirm that WebNet is a "switchless reseller," i.e., it purchases intrastate interexchange telephone service from "underlying" facilities-based intrastate interexchange carriers and resells that service to its own customers. The responses by WebNet to the remaining questions (particularly 7, 8 and 10) clearly establish, however, that WebNet owns (or leases), operates and manages personal property (computers and software) that is used "in connection with or to facilitate communication by telephone," specifically as equipment used for the billing of WebNet's customers.⁶

WebNet receives billing information (bill detail, including originating and terminating numbers, time of call and duration) electronically from its underlying carriers. It processes that information by rating the calls with its own rates, using computers that it owns or leases and "proprietary software." It then transmits the rated information electronically to its billing agent, again using owned or leased computers

⁵ Although WebNet has stated that it no longer provides service in Maine (and no party has disagreed with that statement), if it were to resume service, it most likely would become necessary to determine whether it was a telephone utility at that time.

So that WebNet is aware of the procedural basis for possible Commission action that would terminate its authority to provide telephone utility service, we will consider such action both under 35-A M.R.S.A. § 7106(2)(B), which allows the Commission "consistent with the public interest" to "suspend, restrict or revoke the ...certificate of the ...interexchange carrier" and under 35-A M.R.S.A. § 1321, which allows the Commission "at any time [to] rescind, alter or amend any order it has made" upon notice and an opportunity to be heard, as required by that section. The specific order we would consider rescinding or amending is the order that granted WebNet the authority to provide resold intrastate interexchange service in Maine, issued on March 17, 2000 in Docket No. 2000-100. See ordering paragraphs below.

⁶ WebNet's responses to Items 7, 8 and 10 of the Examiner's data response are attached as Appendix A to this Order.

and leased “proprietary software.” This equipment (the computers and software, which are “personal property”) is used “in connection with communication by telephone” ⁷ (or “to facilitate communication by telephone”). The equipment, as used, is therefore a “telephone line” as defined in 35-A M.R.S.A. §102(20).⁸ WebNet’s answers establish that it owns⁹, controls and/or manages the equipment that constitutes a telephone line. Therefore, WebNet is a “telephone utility” as defined in 35-A M.R.S.A. §102(19).

We base our ruling and finding on the specific facts in this case, which establish that WebNet owns, operates or manages billing equipment used in the provision of telephone service. It is not necessary in this case to reach the Prosecutorial Staff’s argument that, as a switchless reseller, WebNet is involved in the management of a telephone line because of the various activities a switchless reseller undertakes with and on behalf of its customers, including the decisions to connect or disconnect a customer from the service, and making the necessary arrangements with the underlying carrier and the customer’s local exchange carrier. We consider the

⁷ The “connection” in this case is a physical one. The billing information (origination, destination, duration and time of day) is captured during each call and then transmitted to WebNet. The statutory phrase undoubtedly also would encompass equipment that was not connected electronically to the processing of communications.

⁸ For any entity (including a telephone utility) that wishes to be paid for its services, billing equipment is essential. Under the statutory definition, an entity that provides telephone service is a telephone utility only if it does so “for compensation.”

⁹ WebNet states that it either owns or leases the computers and software used for its role in the billing process. It is not necessary in this case to determine whether a lease constitutes “ownership” for the purpose of the statutory definitions of “telephone utility” and “telephone line.” Maine law indicates that the term “owner” is not a rigid one and its meaning may vary depending of the context. See *State v. Mitchell*, 150 Me. 396 114 A.2d 618 (1955); *Alpha Rho Zeta v. Inhabitants of City of Waterville*, 471 A.2d 1131, 1136 (Me. 1984). Because the statutory definition of “telephone utility” and “telephone line” refer to “owning, controlling, operating or managing” in the alternative, and because it is clear that WebNet does all three of the latter activities, we do not need to decide whether leasing constitutes ownership.

We note that the Order Granting Authority to WebNet in docket No. 2000-100 (as well as virtually every other order granting authority that we have issued) makes clear that we define a facilities-based carrier as one that “owns, leases or controls” certain facilities, and a switchless reseller as one that does not. See *Webnet Communications, Inc.*, Order Granting Authority (March 17, 2000) at 2 n. 1. See also the definition of “Interexchange Carrier” in Chapter 280, § 2(F) of our rules.

Prosecutorial Staff's argument to present a broader question than the relatively narrow factual question we have addressed here,¹⁰ and we leave that question for another day.

By this decision, it might appear that we are designating all entities involved in the billing process for telephone service¹¹ as "telephone utilities" even though those entities are not otherwise involved with the provision of telephone service. That impression could arise because of the wording of the statutory definitions of "telephone utility" and "telephone line," which are oriented toward equipment rather than service. We intend nothing so broad here. Although not part of the statutory language, the long-standing common law of this State holds that, for an entity to be a public utility, it must devote its property to "public use." *Gilman v. Somerset Farmers Co-operative*, 129 Me. 243, 151 A. 440 (1930). One of the most important factors in determining whether an entity that "owns, controls, operates or manages" a "telephone line" (or other types of "plant" included in section 102)¹² is a public utility is whether the entity "holds itself out" as providing a utility service to the public."¹³ See *Kimball Lake Shores Association*, M. #221, Issuance of Show-Cause Order (Me. P.U.C., January 31, 1980); *Rackliffe et al. v. Weld Inn*, Docket No. 89-312 (Me. P.U.C., June 11, 1990); *Public Utilities Commission, Request for Commission Investigation Into Central Monhegan Power*, Docket No. 96-481 (October 17, 1996). WebNet clearly meets the "holding out" and other applicable tests. Other entities that are involved solely in the billing process are not as likely to meet the applicable common law tests.

In this case, WebNet has held itself out to the public as providing a service that the public generally would understand to be a public utility service. WebNet's argument seeks to restrict the definition of telephone utility to a narrow class of entities that includes only a small portion of the entities that sell telephone service to the public¹⁴ by trying to find what effectively would amount to a loophole in the statutory scheme. We need not address whether the broad loophole argued by WebNet exists because, based on WebNet's admissions concerning its role in the billing process and the equipment that it uses in that role, it is a telephone utility.

¹⁰ Under the Prosecutorial Staff's argument, all switchless resellers would be telephone utilities, even if they did not own or manage billing equipment.

¹¹ For example, the entity named in WebNet's response to Item 10 as an "industry billing agent."

¹² Or a "gas plant," a "transmission and distribution plant," or "water works." See 35-A M.R.S.A. § 102 (8),(9),(20-A),(20-B),(22) and (23).

¹³ Other factors include the size of the enterprise, whether the enterprise is operated for profit, and whether the terms of service are under the control of the users.

¹⁴ Approximately 40 (or 12%) of 324 certified interexchange carriers in Maine are facilities-based. The remainder (284 or 88%) are switchless resellers.

Because WebNet is a telephone utility, we continue our investigation under 35-A M.R.S.A. §§1303 and 1306(2), which allow the Commission to investigate “any matter relating to a public utility” and to find that “a ... practice, act or service complained of is unjust, unreasonable or otherwise in violation of this Title.” All of the alleged violations contained in the Prosecutorial Staff Report are cognizable under Sections 1303 and 1306. The alleged slamming violations, if proven, would violate 35-A M.R.S.A. § 7106; the alleged charging of rates not on file with the Commission would violate 35-A M.R.S.A. § 309(1); the failure to provide customers notice of rate increases would violate 35-A M.R.S.A. § 7307(2).¹⁵ Each of these three types of statutory violations could constitute acts that are, under Section 1306, either “unjust or unreasonable acts or practices” or “otherwise in violation of this Title.”

The Prosecutorial Staff Report also alleges various other activities, including deceptive and fraudulent practices. All of these, if proven, would serve as bases for finding that unjust or unreasonable practices, acts or services by a public utility under Section 1306. While the deceptive and fraudulent practices appear to be alleged only in connection with claimed slamming violations, the use of such means, if proven, could serve as a basis for a finding of unjust or unreasonable acts or practices independent of any findings concerning the associated slamming violation.

Under 35-A M.R.S.A. § 1306, upon a finding that a “practice, act or service” of a public utility is “unjust or unreasonable or otherwise in violation of this Title,” the Commission “may by order establish or change... [a] practice, service or acts, as it finds to be just and reasonable.” Section 1306 does not contain any specific fining authority. 35-A M.R.S.A. § 1508 states, however:

§1508. Punishment where no penalty

A public utility which willfully violates a provision of this Title, does an act prohibited by it, fails or refuses to perform a duty enjoined upon it for which a penalty is not provided or fails or refuses to obey a lawful requirement or order made by the commission, commits a civil violation for which a forfeiture not to exceed \$1,000 may be adjudged for each offense. The act, omission or failure of an officer, agent or person acting for or employed by a public utility who is acting within the scope of his employment is deemed to be the act, omission or failure of the public utility.

Thus, WebNet could be subject to the penalties outlined in Section 1508 if we find that it has violated the requirements of 35-A M.R.S.A. § 309(1) and 7307(2).

¹⁵ The second and third of these categories apply only to public utilities. As found below, the slamming violations apply to both telephone utilities and non-utility providers of telephone service.

B. Proceedings Under the Slamming Statute

We decide, regardless of its status as a telephone utility, that WebNet is subject to the jurisdiction of the Commission for the alleged slamming violations directly under the provisions of 35-A M.R.S.A. § 7106.

As noted above, WebNet agrees that the Commission has jurisdiction under this section over both telephone utilities and entities that are not telephone utilities. It argues, however, that “although the Commission’s general jurisdiction under Section 7106 is no longer questioned, the Commission nevertheless lacks jurisdiction to conduct this proceeding because Section 7106 does not authorize this proceeding *as it has been initiated... .*” (emphasis added) WebNet thus appears to argue that the “initiation” of a Section 7106 proceeding under Section 1303 is improper because Section 1303 does not apply to non-utilities.

WebNet also seems to argue, however, that the Commission cannot “cure” the “defect by the staff”¹⁶ of bringing the case under Sections 1303 and 1306.¹⁷ The basis for WebNet’s argument is that neither Section 7106 nor the anti-slamming rule (Chapter 296, Selection Of Primary Interexchange And Local Exchange Carriers) contains “published rules or guidelines”¹⁸ and WebNet “could not ensure itself that it is

¹⁶ WebNet here, as in other filings with the Commission, is under the mistaken impression that the Prosecutorial Staff brought this proceeding. In fact, the Commission commenced the investigation of WebNet’s activities on March 5, 2002 by issuing a Notice of Investigation. On April 26, 2002, the Commission issued an Order Regarding Procedures, Discovery And Intervention. In that Order, we designated staff members who had been conducting the investigation as the “Prosecutorial Staff” and ordered it to file a report. The Prosecutorial Staff filed its Report on July 1, 2002. Since its filing, we have treated the allegations in the Report as the allegations we would consider in this proceeding. We ordered WebNet to respond to those findings and, in the Order Continuing Proceeding (September 4, 2002) we rejected arguments by WebNet that we should terminate the proceeding because of WebNet’s disagreement with some of the factual claims contained in the allegations.

¹⁷ Bringing any portion of this case under section 1303 would be a “defect” only if WebNet were not a telephone utility. We have found above that WebNet is a telephone utility.

¹⁸ In fact, Chapter 296 does address process. Section 7 states: “The Director of the Consumer Assistance Division will collect the necessary data and make a recommendation to the Commission regarding the severity of the violation, whether a penalty should or should not be assessed, and the amount of any penalty. ... The Commission may impose the penalty only after giving the alleged violator the opportunity to respond to the Director of the CAD’s recommendation.”

receiving or is able to invoke proper procedural rights and protections.”¹⁹ There is some irony to this argument, because WebNet argues simultaneously that it cannot be subject to a proceeding under section 1303, even though it apparently believes there are ample “published procedures” applicable to proceedings under that section.

WebNet seems to argue that because Section 7106 does not contain specific procedural provisions, the Commission is powerless to act. WebNet is attempting to characterize the alleged defect as a matter of jurisdiction. We do not agree that its argument raises a question of jurisdiction. Rather, WebNet is raising a question about procedure. WebNet is either asking what the procedure is (a question we answer below), or it is arguing that its right to due process is violated by the fact that the applicable procedures are not clear to WebNet (a claim we answer below). The latter argument appears to suggest that if a statute defining a substantive offense and establishing penalty parameters is silent about the procedures that the agency charged with enforcing the statute²⁰ must use, the agency cannot bring a proceeding pursuant to that statute.²¹

In fact, the procedures that apply under Section 7106 are entirely clear and are in substance identical to those that will apply and have applied to this proceeding. It is clear from Section 7106 that the Legislature contemplated an adjudicatory proceeding. Subsection 1 describes the activities that will constitute violations of the statute. Subsection 2 states that the Commission may impose penalties against carriers that violate the section or any rule or order adopted pursuant to the section. To impose a penalty permitted by Section 7106 or Chapter 296, it is

¹⁹ WebNet states that neither Section 7106 nor Chapter 296 makes reference to a Section 1303 investigation, to any hearing procedure, “the involvement of a Prosecutorial Staff” or the “role and participation of the Public Advocate.” We address the right to a hearing below. 5 M.R.S.A. § 9055(2)(B) recognizes the role of “agency staff” who “participate...in an advocate capacity,” (e.g., as “prosecutors”), as well as to other “agency staff” (e.g., a hearing examiner and advisory staff) who may provide “advice” to the agency. The Public Advocate’s participation in Commission proceedings is governed by 35-A M.R.S.A. § 1702 and does have any effect on the procedural rights of WebNet.

²⁰ The Commission clearly is charged with enforcement of this statute. 35-A M.R.S.A. § 7106(2)(A) states that “the Commission shall impose an administrative penalty against any person who violates this section or any rule or order adopted pursuant to this section.” Section 7106(2)(B) makes specific reference to fact-finding by the Commission (“If the Commission finds... .”)

²¹ An analogous, and equally unmeritorious, argument is one a criminal defendant might make that the defendant cannot be prosecuted if the statute defining the offense charged does not state that the defendant is entitled to an indictment, discovery and a jury trial.

necessary for the Commission to make findings that the carrier violated the statute or the Rule. The statute requires specific findings for certain kinds of orders the Commission may issue.²² Findings of the type contemplated by Section 7106 normally must be made in “adjudicatory proceedings.” We find that, taken together with our overarching responsibility to give litigants due process, Section 7106 and Chapter 296 require such an adjudicatory proceeding before we can make the findings and impose the penalties allowed by 35-A M.R.S.A. § 7106 and Chapter 296.

The procedures for adjudicatory proceedings are “published” in detail in Chapter 110, §§ 710-1004 of the Commission’s Rules and in 5 M.R.S.A. §§ 9051-64. The Chapter 110 provisions are consistent with the APA provisions. These provisions apply to any adjudicatory proceeding the Commission might hold, not solely to those under Section 1303.²³

Under Section 7106 and Chapter 296, the procedures will be identical to those under a Section 1303 investigation because the procedural provisions in Chapter 110 and the APA apply in either case.²⁴ WebNet has no legitimate claim that it is

²² See 35-A M.R.S.A. § 7106(2)(B).

²³ The Commission in any case outlined the process to be used in this case as early as April, 2002:

WebNet, as well as the Public Advocate, will be provided an opportunity to submit written responses to the report of the prosecutorial staff. Based on the report and responses, the Commission will determine if further proceedings are warranted. In the event the Commission determines sanctions against WebNet should be considered, WebNet, upon request, will be provided a hearing, as well as a full opportunity for discovery. The hearing procedures will be conducted as an adjudicatory hearing as provided in the Commission’s rules, Chapter 110, Part 7, and Maine’s Administrative Procedures Act, 5 M.R.S.A. §§ 9051-9064.

Order Regarding Procedures, Discovery and Intervention (April 26, 2002) at 2.

²⁴ Numerous procedural provisions in Title 35-A, Chapter 13 (sections 1301-1323) also would appear to apply to adjudicatory proceedings generally and not just to those under Section 1303 and 1306. A few provisions in those sections apply only to public utilities. Sections 1302 and 1303 are substantive provisions that address the initiation of proceedings against public utilities. Section 1306 describes findings and orders that may apply to public utilities. A limited number of other provisions are procedural in nature and appear to apply only to public utilities. See, e.g., 35-A M.R.S.A. §1304 (1) and (2) (governing notice to utilities and “subscribers” of public utilities). The vast majority of procedural provisions in Chapter 13 apply, however, to any proceeding. Because we have found that WebNet is a public utility, there is no difference between the Chapter 13 procedures that apply to a proceeding under Sections 1303 and 1306 and one under Section 7106. Even if we had found that

prejudiced and needs additional time to prepare its defenses because the Commission has “changed” the statutory basis for the slamming violations from one statute to another. The “change” is procedurally inconsequential. As discussed in Part III.A above, the Commission is conducting an investigation under 35-A M.R.S.A. §§ 1303 and 1306 into public utility “acts or practices” that may be “unjust or unreasonable” or “*otherwise in violation of this Title*” (emphasis added), i.e., in violation of 35-A M.R.S.A. § 7106 and Chapter 296. A proceeding against WebNet directly under section 7106 and Chapter 296 does not present any additional issues or entail any different procedures. WebNet has been aware that the slamming violations invoke section 7106 and Chapter 296 at least since the Prosecutorial Staff issued its Report on July 1, 2002.²⁵ The Report refers to Section 7106 generally and, for each of the offense categories described, provides detailed citations of the applicable provisions of Chapter 296.

In addition, the Report relied specifically on the penalty provisions of Section 7 of Chapter 296 to support the Prosecutorial Staff’s request that the Commission impose a penalty of \$5 million against WebNet. WebNet has made numerous statements in this proceeding about the magnitude of the proposed fine, and is presumably aware (or should be, because of the notice provided by the Prosecutorial Staff Report) that the proposed penalty arises under Section 7106 and Chapter 296. Those penalties are not even available under 35-A M.R.S.A. § 1306. In short, the fact that Section 7106 and Chapter 296 are the substantive bases for the slamming violations has been evident for some time, notwithstanding the failure of the first two orders to refer specifically to those provisions and the initial characterization of this proceeding solely as an investigation under 35-A M.R.S.A. § 1303. In any event, we here remove any doubt that we bring the allegations concerning slamming directly pursuant to 35-A M.R.S.A. § 7106 and Chapter 296 of the Commission’s Rules, in

WebNet were not a public utility (or had declined to reach the question), the differences would be minimal because the procedural provisions in Chapter 13 that apply only to public utilities largely duplicate provisions contained in Chapter 110 of the Commission’s Rules and 5 M.R.S.A. §§ 9051-64.

²⁵ Even prior to the Notice of Investigation, it appears that WebNet received notice that the slamming complaints violated Chapter 296. WebNet filed an “Emergency Motion for an Extension of Time to Respond to Prosecutor’s Report” on July 12, 2002. Attached to WebNet’s motion was a copy of a notice from the Consumer Assistance Division (CAD) of a specific alleged slamming violation from almost a year earlier, August 28, 2001. The first line of the notice from the CAD refers specifically to Chapter 296. Although the Notice of Investigation (March 12, 2002) and the Order Regarding Procedures, Discovery and Intervention (April 26, 2002) did not specifically cite Section 7106 or Chapter 296, both of these orders stated that customers had complained that WebNet had changed their long distance telephone service without authorization.

addition to their inclusion as part of the investigation pursuant to 35-A M.R.S.A. §§1303 and 1306.

E. Other Jurisdictional Claims

Two additional arguments by WebNet require comment. WebNet argues that the Commission lacks jurisdiction over those slamming violations for which the Commission alleges deception and fraud as the means for obtaining customer consent. According to WebNet, “such allegations” are solely within the “jurisdiction” of the Attorney General under 5 M.R.S.A. Ch. 9.²⁶ The Commission is not deprived of jurisdiction over an act of slamming simply because the means used to accomplish that act involve fraud or deception or because another tribunal may also have jurisdiction. As discussed above in Part III.A and below, the Commission may consider deceptive or fraudulent actions as acts or practices of a public utility that are unjust or unreasonable. Surely the Commission may also consider deceptive means in determining appropriate penalties under Section 7106 and Chapter 296. Section 7106 does not specifically mention fraud or deceit as a penalty factor, but it allows the Commission to consider “[t]he severity of the violation, including the intent of the violator, the nature, circumstances, extent and gravity of any prohibited acts.” Chapter 296, §7(B) repeats this language, and Section 7(A) states that “[i]n determining whether or not a penalty should be assessed, the intent of the violator may be considered.”

WebNet also argues the “fundamental element” of intent is missing from the allegations of 35 complaints. It is not clear what this alleged defect has to do with subject matter jurisdiction; failure to allege an element of a violation (if it is an element) would not appear to raise an issue of subject matter jurisdiction over slamming violations, which is vested in the Commission by the statute. In any event, nothing in the slamming statute or Rule indicates that “intent” is an element of a slamming violation. On the contrary, the fact that “the intent of the violator” (or presumably, its absence) is expressly stated as a penalty factor in both Section 7106(2) and Chapter 296, §7 indicates that it is not an element, fundamental or otherwise, of the violation.

²⁶ The Attorney General does not possess “jurisdiction” as that term is normally understood, i.e., adjudicatory authority of a tribunal over various matters or subjects. Title 5 M.R.S.A. §§ 191-205 describes the functions of the Attorney General. These sections do not describe any proceedings over which the Attorney General has decisional authority or any other function that would resemble “jurisdiction.” Section 200-C establishes a “State Fraud Division,” the function of which is to “*investigate and prosecute* any act of fraud or attempted fraud perpetrated against the State or any department, agency or commission thereof” (emphasis added). Nothing in that section addresses fraud perpetrated on private individuals. Under 5 M.R.S.A. §199, the Attorney General may prosecute crime, some of which may involve fraud, but nothing states that the Attorney General has exclusive prosecutorial authority over every matter involving fraud.

IV. ORDERING PARAGRAPHS

Accordingly, we

1. DECIDE, contrary to arguments presented by WebNet Communications, Inc. in its Motion to Determine Jurisdiction, that

A. The Maine Public utilities Commission has jurisdiction over the matters raised in this proceeding because WebNet is a telephone utility as defined by the law of Maine, as established by WebNet's responses, filed on December 12, 2002, to the Examiner's Data Request issued on November 27, 2002, which are hereby made part of the record in this case. WebNet is therefore subject to the investigation opened in this docket pursuant to the provisions of 35-A M.R.S.A. §§1303 and 1306; and

B. The Commission also has jurisdiction over WebNet for all allegations of "slamming" pursuant to 35-A M.R.S.A. § 7106 and Chapter 296 of the Commission's Rules, which applies both to telephone utilities and to non-utility providers of local exchange and interexchange telephone service.

2. NOTIFY WebNet Communications, Inc. that the Commission, in the investigation commenced in this docket on March 12, 2002, pursuant to 35-A M.R.S.A. §§ 1303 and 1306, will:

A. CONSIDER all allegations contained in the Prosecutorial Staff Report issued on July 1, 2002, including:

1. All allegations that WebNet engaged in "slamming" in violation of 35-A M.R.S.A. §7106 and Chapter 296 of the Rules of this Commission;

2. All allegations that WebNet did not charge customers the rates that were on file with the Commission, in violation of 35-A M.R.S.A. §309(1);

3. All allegations that WebNet failed to provide its customers with notice of increases in its rates as required by 35-A M.R.S.A. § 7307(2);

4. All allegations that WebNet engaged in deceptive or fraudulent practices in the course of obtaining customer consent to change carriers; and,

5. All other allegations contained in Part III, (B) and (E) and Part IV, (A), (B) and (C) of the Prosecutorial Staff Report.

B. CONSIDER, if allegations described in subparagraph A above are proven, whether to enter such orders as are permitted under 35-A M.R.S.A. § 1306;

C. CONSIDER, if allegations of violations of 35-A M.R.S.A. §§ 309(1) and 7307(2) are proven, whether to impose fines on WebNet, as permitted by 35-A M.R.S.A. § 1508;

D. CONSIDER whether to revoke, pursuant to 35-A M.R.S.A. §§ 1321 and 7106(2)(B), the authority of WebNet Communications, Inc. to provide intrastate interexchange telephone service, granted by this Commission on March 17, 2000, in Docket No. 2000-100;

E. CONSIDER whether to revoke, pursuant to 35-A M.R.S.A. §§ 1321 and 7106(2)(B), the authority of WebNet Communications, Inc. to provide intrastate interexchange telephone service, granted by this Commission on March 17, 2000, in Docket No. 2000-100; and,

F. CONDUCT this proceeding pursuant to the procedural provisions contained in Chapter 13 of Title 35-A, Chapter 110 of the Rules of the Commission (Practice and Procedure) and 5 M.R.S.A. §§ 9051-64.

3. NOTIFY WebNet Communications, Inc. that the Commission, pursuant to 35-A M.R.S.A. § 7106 and Chapter 296 of the Rules of the Commission, will also:

A. CONSIDER all allegations contained in the Prosecutorial Staff Report issued on July 1, 2002, that WebNet engaged in "slamming" in violation of 35-A M.R.S.A. § 7106 and Chapter 296 of the Rules of this Commission;

B. CONSIDER, if allegations described in subparagraph A are proven, whether to impose fines on WebNet as permitted by 35-A M.R.S.A. § 7106(2) and Chapter 297, § 7 of the Rules of the Commission;

C. CONSIDER, if the allegations in subparagraph A are proven, whether to require WebNet to provide reimbursements or credits to customers and undertake other remedial actions, as authorized by 35-A M.R.S.A. § 7106(1)(D) and Chapter 296, § 5 and as requested by Part V(2) of the Prosecutorial Staff Report; and,

D. CONDUCT the proceedings described in this paragraph pursuant to the procedural provisions contained in Chapter 13 of Title 35-A, Chapter 110 of the Rules of the Commission (Practice and Procedure) and 5 M.R.S.A. §§ 9051-64. All portions of the record that relate to violations of 35-A M.R.S.A. § 7106 and Chapter 296 that have been developed in the investigation pursuant to 35-A M.R.S.A. §§ 1303 and 1306 prior to and including this date shall be included in the record applicable to the considerations described in this ordering paragraph.

Dated at Augusta, Maine, this 9th day of January, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought .
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.